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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1193

UNITED STATES OF AMERICA, *Appellant*

v.

TRAVIS PAUL ENMONS, JACKIE J. BENDO, ED WAYNE BARTON, AND MILTON RAY WOODWARD, *Appellees*

On Appeal from the United States District Court for the Eastern District of Louisiana

BRIEF FOR APPELLEES

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On Appeal from the United States District Court for the Eastern District of Louisiana

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BRIEF FOR APPELLEES

QUESTION PRESENTED

Whether the commission of violence during the course of a lawful strike in order to secure an employer's agreement to a union contract calling for higher wages and other monetary benefits constitutes the crime of "extortion" within the meaning of the Hobbs Act punishable by a $10,000 fine and twenty years imprisonment.

STATEMENT

On October 15, 1970, a one-count indictment was returned in the United States District Court for the Eastern District of Louisiana. The indictment alleges that Gulf States Utilities Company is an interstate public utility operating in Louisiana and Texas engaged in supplying electrical energy (JS 12a). International Brotherhood of Electrical Workers, Local Union 2286, represents the employees of the Company (JS 13a). International Brotherhood of Electrical Workers, Local Union 390, represents employees of independent contractors engaged by the Company (JS 12a-13a). Defendant-appellee Travis Paul Enmons is the business manager and a member of Local 390; defendant-appellee Jackie J. Bendo is the assistant business manager and a member of Local 390; defendant-appellee Milton Ray Woodward is a member of Local 390; and defendant-appellee Ed Wayne Barton is business manager and a member of Local 2286 (JS 13a).

The indictment alleges five acts of violence in the period between October 30, 1969 and June 2, 1970 in which one or another of the appellees and named co-conspirators are said to have participated (JS 14a-15a). These allegations are: (1) On October 30, 1969, appellee Bendo and a co-conspirator fired a high powered rifle into a transformer substation of the Company, known as the Alsen Substation, intending to cause the equipment to malfunction (JS 14a-15a). (2) About November 10, 1969, appellee Woodward and a co-conspirator fired high-powered rifles into a transformer substation of the Company, known as the Lindsey Substation, intending to cause the equipment to malfunction (JS 15a). (3) About December 9, 1969, appellee Woodward and two co-conspirators went to a substation of

the Company, known as the Port Hudson Bulk Station, where they drained the oil from the transformers located there, intending to cause the equipment to malfunction (JS 15a). (4) About December 9, 1969, appellee Woodward and two co-conspirators fired a high powered rifle into a transformer substation, known as the Lindsey Substation, for the purpose of causing the transformer to malfunction (JS 15a). (5) About June 2, 1970, two co-conspirators, at the instructions of appellee Bendo, blew up a transformer substation of the Company, known as the Sandy Creek Substation, using twelve sticks of dynamite (JS 15a).

The indictment charges that these acts of violence were perpetrated in fulfillment of a conspiracy of the appellees and others, the conspiracy being "to obstruct, delay, and affect commerce, . . . by extortion, . . . and to commit physical violence to property in furtherance" of it (JS 13a-14a). The conspiracy is particularized as a plan to "obtain the property" of the Company "in the form of wages and other things of value" with the consent of the Company, "such consent to be induced by the wrongful use of actual force, violence, and fear of economic injury . . ." (JS 14a). The violence was committed and the Company's property destroyed, it is alleged, "in order to force said Company to agree to a contract with Local 2286 . . . calling for higher wages and other monetary benefits" (JS 14a).

The indictment charges that these acts constitute extortion in violation of 18 U.S.C. § 1951 (JS 14a, 16a), the Hobbs Act. That Act makes it a crime to obstruct, delay or affect commerce, or to attempt or conspire to do so, "by robbery or extortion . . ." The term "extortion" is defined to mean "the obtaining of property

from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." A violation subjects the offender to a fine of "not more than $10,000" or imprisonment for "not more than twenty years, or both."

On motion, the District Court dismissed the indictment for failure to state an offense within the scope of the Hobbs Act (JS 11a). It is common ground, as the District Court stated in its opinion, that "the defendants were union members who were on strike against their employer, Gulf States Utilities Company"; "[t]here is no suggestion that the strike itself was illegal, nor is there any suggestion that the object of the strike, i.e., to secure higher wages from Gulf State Utilities Company was an illegal objective" (JS 4a-5a). Accordingly, as focused by the District Court, the "only question presented is whether or not the acts with which defendants are charged constituted 'extortion' as contemplated by the Hobbs Act" (JS 5a). It concluded that they "do not" (*ibid.*).

The District Court observed that, "[i]f the wages sought by violent acts are wages to be paid for unneeded or unwanted services, or for no services at all, there is good authority for the conclusion that such would constitute extortion prohibited by the Act" (JS 8a). The indictment, however, alleges no such conduct but is instead based on the premise that the Hobbs Act proscribes as extortion of property recourse to violence to support a simple demand for increased wages standing alone (JS 9a). In the District Court's view "the wages of bona-fide employees" do not "constitute 'property' as contemplated by the Hobbs Act. The union had a right to disrupt the business of the employer by lawfully striking for higher wages. Acts of violence oc-

curring during a lawful strike and resulting in damage to persons or property are undoubtedly punishable under State law. To punish persons for such acts of violence was not the purpose of the Hobbs Act . . . . [T]hese acts simply did not constitute the 'obtaining of property from another' that is contemplated by the Hobbs Act" (JS 9a-10a).

Dependent on their character the acts of violence and property damage charged in the indictment, alleged to have occurred in Louisiana, are criminally punishable by Louisiana law as "aggravated arson," "simple arson," "aggravated criminal damage to property," "simple criminal damage to property," or a "criminal conspiracy" or "an attempt" to commit these offenses. LSA-R.S. 14:51, 52, 55, 56, 26, 27 (West's 1951). Aggravated arson, punishable by imprisonment at hard labor for not less than two nor more than twenty years, is defined as follows (14:51):

> Aggravated arson is the intentional damaging by any explosive substance or the setting fire to any structure, watercraft, or moveable whereby it is foreseeable that human life might be endangered.

Simple arson carries a lesser punishment than aggravated arson. It subjects an offender to a maximum fine of $5,000 and maximum imprisonment at hard labor for ten years if the damage amounts to $500 or more, and to a maximum fine of $500 or maximum imprisonment of one year, or both, where the damage is less than $500. Simple arson is defined as follows (14:52):

> Simple arson is the intentional damaging by any explosive substance or the setting fire to any property of another, without the consent of the owner

> and except as provided in Article 51 (aggravated arson).

Aggravated criminal damage to property, punishable by imprisonment with or without hard labor for not less than one nor more than fifteen years, is defined as follows (14:55):

> Aggravated criminal damage to property is the intentional damaging of any structure, watercraft, or moveable, wherein it is foreseeable that human life might be endangered, by any means other than fire or explosion.

Simple criminal damage to property bears a lesser punishment than aggravated criminal damage. It subjects an offender to a maximum fine of $1,000, and maximum imprisonment of two years, or both, when the damage done amounts to $500 or more; where the damage is less than $500, the offender is punishable by a maximum fine of $500, maximum imprisonment of six months, or both. Simple criminal damage to property is defined as follows (14:56):

> Simple criminal damage to property is the intentional damaging of any property of another, without the consent of the owner, except as provided in Article 55 (aggravated criminal damage to property), by any means other than fire or explosion.

Louisiana also prohibits a "criminal conspiracy" to commit any crime or "an attempt to commit the offense intended", and with respect to arson and criminal damage to property the offender in either case "shall be fined or imprisoned, or both, in the same manner as for the [consummated] offense . . .; but such fine or imprisonment shall not exceed one-half of the

largest fine, or one-half of the longest term of imprisonment prescribed for such [consummated] offense . . ., or both." 14:26, 27.

The criminal process of Louisiana has been invoked against appellees with respect to the incidents charged in the federal indictment. As to the alleged draining of oil from the transformers at the Port Hudson Bulk Station on December 9, 1960 (*supra,* pp. 2-3), appellees Bendo and Woodward have been convicted of simple criminal damage to property, fined $500, and sentenced to imprisonment for one year. The convictions have been appealed. With respect to the alleged firing of a high-powered rifle into the Alsen Substation on October 30, 1969 (*supra,* p. 2), a bill of information charging simple criminal damage to property was issued but the prosecution has been dropped. As to the three other alleged incidents, no affidavit in support of an arrest was filed with respect to the incident at the Lindsey Substation on December 9, 1969 (*supra,* p. 3), an affidavit in support of arrest was filed charging aggravated criminal damage to property at the Lindsey Substation on November 10, 1969 (*supra,* p. 2), and an affidavit in support of arrest was filed charging conspiracy to commit aggravated arson by dynamiting the Sandy Creek Substation on June 2, 1970 (*supra,* p. 3). No bills of information or indictments have issued on these charges, and the bail bonds have been returned.

The federal indictment dismissed in this case had been returned on October 15, 1970 in the Eastern District of Louisiana. Contemporaneous indictments based on an identical concept of the Hobbs Act returned in other parts of the country have been similarly dismissed. An indictment was returned in the District of

Arizona on December 9, 1969, and on appeal from a judgment of conviction the Court of Appeals for the Ninth Circuit ordered the indictment dismissed. *United States* v. *Caldes,* 457 F.2d 74 (1972). Two indictments were returned in the Southern District of Florida in early 1970, and each was dismissed without opinion by the District Court in June 1970. *United States* v. *Rutcofsky,* D.C.S.D. Fla., No. 70-101-CR-JE, June 24, 1970; *United States* v. *Schiffman,* D.C.S.D. Fla., No. 70-102-CR-JE, June 25, 1970.[1]

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[1] A similar indictment was returned in the Eastern District of New York on January 12, 1972, but proceedings on that indictment have been stayed pending decision in this case. *United States* v. *Spero, et al.,* D.C.E.D.N.Y., No. 72 CR 17. The *Spero* indictment alleges a conspiracy to "obtain the property of Cosmopolitan, to wit, its money, in the form of wages for the employment" of four named defendants and one named co-conspirator (¶ 7), and "a union labor collective bargaining contract . . ." (¶ 8). Three of the four named defendants and the named co-conspirator, whose sought-for "employment" the indictment alleges as objectionable, were found by the National Labor Relations Board on January 27, 1972, to be among the twelve employees against whom Cosmopolitan had discriminated in regard to their hire and tenure of employment. *Cosmopolitan Dry Cleaning Machinery Co.,* 195 NLRB No. 31, 79 LRRM 1334 (1972). The NLRB Trial Examiner, whose findings the NLRB adopted, found that "the installation employees refused to go to work without assurances that they would be paid for the Memorial Day holiday, and that . . . [Cosmopolitan's secretary-treasurer] asked each man to go to work and fired him upon his refusal to do so" (TXD sl. op. p. 5). "As their concerted refusal to work for this reason was a protected activity within the meaning of Section 7 of the Act, . . . the Company violated Section 8(a)(1) of the Act by discharging them for this activity" (TXD sl. op. p. 10). The *Spero* indictment is thus evidently based on the theory that to seek the reinstatement of discriminatorily-discharged employees constitutes "the obtaining of propery from another" within the prohibition of the Hobbs Act.

SUMMARY OF ARGUMENT

I

The Hobbs Act embodies the conventional concept of extortion as a compound crime combining the willful exertion of wrongful means employed with the felonious intent to misappropriate property. The indictment in this case charges as extortion the use of violence to obtain a union contract "calling for higher wages and other monetary benefits" (JS 14a). It therefore fails to allege a constituent element of extortion because nothing in it charges the felonious misappropriation of another's property. For there is no way at all that efforts to secure a collective bargaining agreement establishing higher wages and other monetary benefits can possibly be characterized as misappropriation of another's property with felonious intent. An employer who pays wages and other benefits in exchange for work performed for him is not having his property misappropriated. What he gives is the quid pro quo for what he gets. Of course the use of violence to fix the terms for the performance of work is wrongful. It is punishable criminally and remediable civilly. But it is not extortion because it is not the felonious misappropriation of property.

The legislative history of the Hobbs Act clearly shows that its proponents meant to reach extortion in the conventional sense and that they knowingly embraced the felonious misappropriation of property as an indispensable constituent of extortion. Two other elements of the history further confirm this reading of the Hobbs Act. First, Congress intended to bring within the scope of extortionate conduct the activity which this Court in *United States* v. *Local 807*, 315 U.S. 521 (1942), held

had been excepted from the reach of the Federal Anti-Racketeering Act of 1934 as "the payment of wages by a bona-fide employer to a bona-fide employee." Second, to accomplish this end, Congress adopted the definition of robbery and extortion embraced by the New York statute.

Read with maximum expansiveness, the disfavored conduct revealed in the *Local 807* case which Congress desired to prohibit as extortion is confined to the use of wrongful means to compel payment of wages for "imposed, unwanted, superfluous and fictitious services ...." *United States* v. *Green*, 350 U.*S.* 415, 417 (1956). This conduct is of course well within the ready and conventional meaning of extortion; it is the felonious misappropriation of another's property to coerce him to give up his money for which he receives nothing in exchange but "imposed, unwanted superfluous and fictitious services." The indictment in this case, however, charges no such conduct. It is levelled instead at obtaining a union contract "calling for higher wages and other monetary benefits" for the performance of services desired by and valuable to the employer. Exaction of payment for "imposed, unwanted, superfluous and fictitious services" is at the opposite end from seeking increased compensation for desired and valuable work. The Hobbs Act does not bridge, but designedly maintains the distance between, these two extremes.

To reach the disfavored conduct revealed in the *Local 807* case, but to repel the accusation that their aim was "antilabor" in tenor, the proponents of the Hobbs Act repeatedly asserted that they had done no more than to incorporate into that Act the conventional definitions of robbery and extortion expressed in the New

York statute. It is therefore appropriate to look to New York law. That law refutes any notion that labor action can be extortionate when it is directed at obtaining a union contract "calling for higher wages and other monetary benefits." In New York, felonious intent to misappropriate property divides the licit from the illicit in determining whether labor action is extortionate. When the object of the activity is the personal enrichment of the actor, rather than the economic benefit of the worker, it is extortion; on the other hand, when the end which the activity serves is attainment of a legitimate labor objective, there is no extortion because there is no intent to misappropriate property. Under New York law, therefore, given the objective of securing an improved union contract, there can be no extortion because there can be no felonious misappropriation of property. We know of no case in New York, or in any other jurisdiction, where the exertion of wrongful means to secure better employment terms has been suggested, much less held, to be extortionate.

Congress reaffirmed its purpose to exclude obtaining improved employment terms from the scope of an extortion statute when in 1959 it enacted section 602 of the Labor-Management Reporting and Disclosure Act to reach "extortionate picketing." In section 602, Congress barred picketing for "the personal profit or enrichment of any individual" but explicitly excepted picketing conducted to secure "a bona fide increase in wages or other employee benefits." Section 602 supplements the Hobbs Act. Its precise role is to make sure that, if not already reached and punishable by the Hobbs Act, nonviolent picketing would be reached and identically punishable by section 602 when its purpose is "the personal profit or enrichment of any individual"

—the "shakedown," the "buy off," the "payoff." But expressly in section 602, and inherently in the Hobbs Act which it supplements, Congress excludes from the concept of extortion securing "a bona fide increase in wages or other employment benefits."

The central fallacy in the Government's position is epitomized in its statement that "higher wages obtained for wanted services through threats or acts of violence stand on no different footing under the Hobbs Act than wages for unwanted services similarly obtained" (Br. p. 10). The Government thus cuts off extortion from its roots in the felonious misappropriation of property and treats the offense as if it were founded in violence simpliciter. But violence as such is not extortion and is not punishable as extortion.

II

When the Government would convert an extortion statute into a medium by which to reach violence simpliciter in labor disputes, it wrenches industrial violence from its societal context, disregards the traditional means by which that wrong has been regulated, works a gross distortion of state-federal relations in this area, and disserves other important interests.

First, the legal control of strike violence, by both criminal and civil means, is essentially and primarily within the province of the States. A reading of the Hobbs Act to reach strike violence as such would mark a major federal encroachment upon a traditional state domain. Given the primary responsibility of the States to define and prosecute crimes, and the dislocation of federal-state relations resulting from reading a federal criminal statute to intrude upon state criminal juris-

diction, this Court abjures an expansive interpretation in the absence of a clear direction from Congress. No such direction appears in the Hobbs Act justifying conversion of an extortion statute into a means by which to reach industrial violence simpliciter.

Second, the Government's expansive reading of the Hobbs Act would bear with especial severity on the individual who is accused of strike violence. All strike violence would be swept within the scope of the Hobbs Act, from the fist fight to murder, from a deflated tire to arson, and all would be subject to the same Draconian punishment of twenty years imprisonment and a $10,000 fine. In contrast, state law is much more circumspect, making careful distinctions in the gravity of the particular wrong and the harm it causes, and moderating the punishment to fit the crime. It is highly unlikely that, had Congress indeed faced the question of strike violence and decided to control it as a federal crime, it would not have graded both the particular offense and the corresponding punishment as state law ordinarily does.

But the severity on the individual does not stop with the impact of the Hobbs Act standing alone. For, as successive state and federal prosecutions for the same offense are not barred, a person accused of strike violence faces both state and federal prosecution and punishment. For example, in the case of strike violence constituting aggravated arson occurring in Louisiana, an accused could be prosecuted, convicted, and sentenced to twenty years imprisonment by Louisiana, and could be prosecuted, convicted, and sentenced to another twenty years imprisonment by the United States. Thus, under the Government's view, Congress exposed the individual to double prosecution and to vastly in-

creased punishment for the offense by adding federal to state sanctions. It is to the last degree unlikely that in enacting the Hobbs Act Congress confronted or intended any such result.

Third, the extension of the Hobbs Act to reach strike violence as such would overextend limited federal resources. There are simply not enough federal law officers to begin to police strike violence erupting everywhere and anywhere in the United States. The implication of this factor is not limited to the unlikelihood that Congress would dilute federal police resources by expending it on matters that local authority can handle at least as well. The implication is far more fundamental and fateful as it relates to the preservation of the evenhanded administration of justice. For if federal police resources are not adequate to the task, the inevitable consequence will be that federal law will be applied haphazardly or invidiously. It will vary from situation to situation and from community to community dependent on the accident of the preoccupation, zeal, interest, or worse of a particular United States Attorney. That environment breeds "arbitrary and erratic arrests and convictions" (*Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972)), a regime which this Court does not encourage or facilitate. Nor should the added burden on an already overtaxed federal court system be overlooked.

Fourth, to moderate the sweep of its reading of the Hobbs Act, the Government would except from the strike violence it would reach "incidental injury to person or property that not infrequently occurs as a consequence of the charged atmosphere attending a

prolonged labor dispute . . ." (Br. p. 19). But this retreat compounds the vice of its position. For the Government has now created an unknowable crime, one that is void for vagueness. No one can say what strike violence is "incidental" and what is not, when the intention to commit it should be excused because energized by emotion, how "prolonged" a labor dispute must be before its duration justifies disregard of violence because it is the product of frustration, and at what level the degree of violence overbalances the provocation which causes it. The Government cannot salvage its overbroad reading of the Hobbs Act by inventing a limited construction which is itself so imprecise that it creates a standardless crime.

Fifth, we return to our starting point. The Hobbs Act crime of extortion is a "larceny-type" offense.[2] It is not stealing to seek a union contract "calling for higher wages and other monetary benefits." This is not the target at which Congress aimed. As is required in the interpretation of a criminal statute, giving the Hobbs Act a strict but sensible construction, in keeping with the rule in favor of lenity, it cannot be read to reach strike violence when that violence is not conjoined with the felonious misappropriation of property, and to seek an improved union contract is not to misappropriate another's property with felonious intent.

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[2] *United States* v. *Sweeney,* 262 F.2d 272, 275 (C.A. 3, 1959).

ARGUMENT

The Commission of Violence During the Course of a Lawful Strike in Order To Secure an Employer's Agreement to a Union Contract Calling for Higher Wages and Other Monetary Benefits Does Not Constitute the Crime of Extortion Within the Meaning of the Hobbs Act.

We divide our brief into two parts. In Part I we show that the felonious misappropriation of another's property is an essential element of the Hobbs Act crime of extortion, and that to obtain a union contract "calling for higher wages and other monetary benefits" is simply not the felonious misappropriation of another's property. In Part II we show that, were extortion divorced from felonious misappropriation of property and used as a means to reach violence simpliciter in labor disputes, the result would be to disregard the societal setting of industrial violence, to dislocate the existing and traditional means by which it is controlled, to distort federal-state relations in this area, and to disserve other important interests.

I. THE FELONIOUS MISAPPROPRIATION OF ANOTHER'S PROPERTY IS AN ESSENTIAL ELEMENT OF THE HOBBS ACT CRIME OF EXTORTION AND OBTAINING AN IMPROVED UNION CONTRACT FAILS TO SUPPLY THAT ELEMENT.

A. The Hobbs Act Embodies the Conventional Concept of Extortion as a Compound Crime Combining the Willful Exertion of Wrongful Means Employed With the Felonious Intent to Misappropriate Property.

". . . [T]here are two essential elements of a Hobbs Act crime: interference with commerce, and extortion." *Stirone* v. *United States,* 361 U.S. 212, 218 (1960). In this case adverse effect on interstate commerce is not in

question. But extortion is. It is therefore essential to identify the constituents of extortion in order to ascertain whether the indictment in this case sufficiently charges that crime.

Extortion is a compound crime. It is, in essence, composed of willful actual or threatened injury to person or property *plus* the use of that means with the felonious intent to misappropriate the property of another. Both elements must coexist to constitute extortion. Thus, willful violence to the person is, standing alone, an assault. Intentional misappropriation of the property of another is, standing alone, larceny. The conjunction of the two is extortion.

"... [T]o protect not only against misappropriation but also against injuries which may result from peculiarly dangerous means devised for accomplishing misappropriation, there developed the law of aggravated theft"—robbery and extortion.[3] "The law of aggravated theft is designed to deter conduct which tends to result in misappropriation of property *and* physical or mental injury ..."[4] "Extortion is a compound felony and therefore requires proof of felonious intent which will not be implied merely because the means are wrongful."[5]

Willful misappropriation of property, not recourse to wrongful means alone, is thus an essential constituent of the crime of extortion. "To constitute extortion at

[3] Note, *A Rationale Of The Law Of Aggravated Theft*, 54 Colum. L. Rev. 84 (1954).

[4] *Id.* at 101 (emphasis in original).

[5] Note, *Labor Faces The Amended Anti-Racketeering Act*, 101 Penn. L. Rev. 1030, 1052 (1953).

common law, and very generally under the statutes, there must be a corrupt intent."[6]

The Hobbs Act embodies the conventional concept of extortion as a compound crime combining the willful exertion of wrongful means employed with the felonious intent to misappropriate property. The Hobbs Act was Congress' response to this Court's decision in *United States* v. *Local 807*, 315 U.S. 521 (1942) (*infra*, p. 27). In *Local 807*, the Court held that it was not a violation of the Federal Anti-Racketeering Act of 1934 to exact money, by use or threat of violence, from an employer for whom no services are performed for the money, when a good faith tender of work is made to the employer which the offeror is willing to perform but which the employer rejects. This Court decided *Local 807* on March 2, 1942. Hearings on three bills addressed in part to the *Local 807* decision were held by a subcommittee of the House Judiciary Committee on April 2, 17, 20, 22, 24, 28, and May 1, 1942.[7] At the conclusion of the hearings, Representative Sam Hobbs, the moving force behind the enactment of the Hobbs Act, defended his bill, H.R. 6872, but stated that he proposed to substitute a new bill for it.[8] His explanation expresses the abiding theme which runs throughout the history of the enactment of the Hobbs Act:[9]

> . . . I wish to call your attention to the fact that the elements of the crime denounced by this bill are

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[6] Clark & Marshall, A Treatise On The Law of Crimes, § 12.17, p. 898 (7th ed. 1967).

[7] Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 5218, H.R. 6752, and H.R. 6872, 77th Cong., 2d Sess. (1942), hereafter cited as Hearings.

[8] He did introduce a new bill, H.R. 7067, 77th Cong., 2d Sess. (1942), reported in H. Rep. No. 2176, 77th Cong., 2d Sess. (1942).

[9] Hearings, 426-428.

> essentially the same as the elements of robbery or extortion. The only added element is interference with interstate commerce. In order to amplify and clarify, I am seriously considering a revision of H.R. 6872 so that it will denounce interference with interstate commerce by robbery or extortion in haec verba. Of course, the revised bill should include conspiracy and attempts to commit such a crime, but the essence would be interference with interstate commerce by robbery or extortion.
>
> * * *
>
> This bill is grounded upon the bedrock principle that crime is crime, no matter who commits it, and that robbery is robbery and extortion, extortion, whether the perpetrator has a union card in his pocket or not.

Representative Hobbs reiterated this refrain in debate on the House floor in 1943 and 1945, stressing that the reach of the bill was limited to robbery and extortion in the conventional sense.[10] "That is all we are shooting at. Those words have been construed a thousand times by the courts. Everybody knows what they mean."[11]

And everybody knew, as the 1943 and 1945 House floor debates made clear, that extortion required, not simply the use of wrongful means, but the felonious intent to misappropriate property. Thus, Representative Gwynne explained "what a prosecutor would need to allege and prove to get conviction under this law if this bill becomes law" (91 Cong. Rec. 11903 (1945)):

> First, they would need to prove that the activity complained of in some way affected interstate

[10] 89 Cong. Rec. 3217 (1943); 91 Cong. Rec. 11900, 11912 (1945).

[11] 91 Cong. 11912 (1945). See also, *infra*, pp. 28-30.

> commerce; second, they would have to prove that there was an actual, not a theoretical, taking of personal property; third, they would have to prove that the taking was by violence, by personal violence, or by actual threats of personal violence; and then, fourth, they would have to prove that the acts done—they might be violent, they might take something, but the Government would have to prove in addition that the acts done did not come within the exceptions set out in title III [now part (c)].

The second and third elements are presently relevant. The second element—the "taking"—is the intentional misappropriation of property; the third element—the "violence"—is the intentional exertion of wrongful means to effectuate the misappropriation. Both must coexist.

If there were any doubt that wrongful means and felonious misappropriation must conjoin, an ensuing colloquy put the question to rest. It shows that wrongful means do not alone suffice to establish extortion; those means must be employed to effectuate a "taking" which is proscribed because it constitutes a feloniously intentional misappropriation of property. Representatives Voorhis, Walter, and Hobbs, referring to Representative Gwynne's explanation, stated that (91 Cong. Rec. 11908 (1945)):

> MR. WALTER. Our distinguished colleague from Iowa [Mr. Gwynne] pointed out the elements that it would be necessary to prove in order to make out a crime and I call the gentleman's attention to the fact that *a mere threat does not constitute a crime.* There must accompany that threat an *unlawful* taking. [Emphasis supplied.]
>
> MR. VOORHIS of California. I thank the gentleman. And certainly demands for higher wages or

attempts to collect union dues are not unlawful acts by any stretch of the imagination.

Responding to Representative Voorhis' statement, Representative Hobbs agreed with him, saying that (*ibid.*):

> May I add that the gentleman, in my opinion, is exactly correct and takes the proper position in his questions.

The upshot of this colloquy is clear. A "threat" alone is not enough—that constitutes wrongful means only. It must be accompanied by an *"unlawful"* taking"—that means the misappropriation of property with felonious intent. And misappropriation of property—a distinct and separate element of the offense—does not embrace "demands for higher wages or attempts to collect union dues." As Representative Walter had earlier stated, "the taking must be an *unlawful* taking", to which Representative Hobbs replied, "Certainly, sir." 91 Cong. Rec. 11901 (1945) (emphasis supplied). And, replying to a suggestion that "extortion . . . would apply to an initiation fee in a labor union", Representative Hobbs responded with an emphatic "Certainly not." 89 Cong. Rec. 3228 (1943).

The reiterated theme that wrongful means, unconnected with a felonious intent to misappropriate property, does not constitute extortion, is further importantly exemplified by Representative Hobbs' forceful rejection of the idea that strike misconduct as such is extortionate (89 Cong. Rec. 3213 (1943)):

> MR. MARCANTONIO. All right. In connection with a strike, if an incident occurs which involves—
>
> MR. HOBBS. The gentleman need go no further.

This bill does not cover strikes or any question relating to strikes.

* * *

MR. MARCANTONIO. That does not answer my point. My point is that an incident such as a simple assault which takes place in a strike could happen. Am I correct?

MR. HOBBS. Certainly.

MR. MARCANTONIO. That then could become extortion under the gentlemen's bill, and that striker as well as his union officials could be charged with violation of sections in this bill.

MR. HOBBS. I disagree with that and deny it in toto.

Representative Hobbs could "disagree . . . and deny . . . in toto" that strike misconduct standing alone is extortionate because of the total absence in this situation of the indispensable additional element of intentional misappropriation of property essential to extortion.

In the Hobbs Act, in defining extortion, the element of misappropriation of property is embraced in the words "obtaining property from another," and the element of proscribed means is embraced in the words "induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." While the word "wrongful" in this definition literally precedes the recital of the prohibited means, the concept of "wrongful" also attaches to the "obtaining of property from another." Representative Voorhis put the following question to Representative Hobbs: "In subsection (c), page 2, there is the word 'wrongful.' Does that word 'wrongful' apply to the entire section?" Representative Hobbs replied, "Yes; it quali-

fies the whole section." 91 Cong. Rec. 11908 (1945). And Representative Hobbs could say accurately, if not perhaps grammatically, that the word "wrongful" "qualifies the whole section" because the core concept of extortion embraces as an indispensable element the feloniously intentional misappropriation of property.

In sum, extortion is the compound crime of exerting wrongful means to misappropriate the property of another. Specific intent is essential to each of these two distinct elements of the offense. There must be a specific intent to resort to wrongful means; there must be a specific intent to misappropriate another's property. The gravamen of the crime "is the felonious intent—animus furandi—the intention to steal"; " 'there must be not only a wrongful act, but a criminal intention.' "[12] Essential to a Hobbs Act crime, as to all kindred felonies, is a " 'vicious will' ", a "concurrence of an evil-meaning mind with an evil-doing hand . . . ." *Morissette* v. *United States,* 342 U.S. 246, 251 (1952).

B. Obtaining a Union Contract Fixing Higher Wages and Improved Monetary Benefits Is Not the Felonious Misappropriation of Another's Property.

We have shown that felonious intent to misappropriate the property of another is an essential element of extortion. That requirement is fatal to the indictment in this case. For the indictment alleges only that, as part of a conspiracy to "obtain the property of the Gulf States Utilities Company in the form of wages and other things of value", the defendants used violent means "to force said Company to agree to a

[12] *United States* v. *Nedley,* 255 F.2d 350, 356, 358 (C.A. 3, 1958); see also, *United States* v. *Green,* 246 F.2d 155, 159 (C.A. 7, 1957), cert. denied, 355 U.S. 871 (1957); *United States* v. *Sweeney,* 262 F.2d 272, 275 (C.A. 3, 1959).

contract with Local 2286 of the International Brotherhood of Electrical Workers calling for higher wages and other monetary benefits" (JS 14a). Thus, the property of another which is the alleged object of misappropriation is securing a union contract from an employer calling for higher wages and other monetary benefits. That allegation wholly fails to charge a crime within the scope of the Hobbs Act. There is no way at all that efforts to secure a collective bargaining agreement establishing higher wages and other monetary benefits can possibly be characterized as misappropriation of another's property with felonious intent.

An employer who pays wages and other benefits in exchange for work performed for him is not having his property misappropriated. What he gives is the quid pro quo for what he gets. An employer and a worker may of course disagree as to how much should be paid for the work. But a worker who insists that he should get more than the employer wants to give is no more seeking to misappropriate the employer's property than is the employer seeking to misappropriate the worker's labor when he insists upon paying less than the worker wants. They are simply at loggerheads about the price to be paid for what each has to offer to the other. Violence by neither is a permissible means to break the deadlock, and there are ample means to punish violence when either resorts to it (*infra*, pp. 56-59). But violence is not extortionate unless it is directed to the willful misappropriation of another's property. And fixing the terms for the performance of work is simply not misappropriation of property. As expressed in the blunt to-the-point observation in which the proponents of the Hobbs Act concurred, "certainly demands for higher wages . . .

are not unlawful acts by any stretch of the imagination" (*supra*, pp. 20-21).

It is necessary to be mindful of the inchoate character of a collective bargaining agreement, and the remove from the actual enjoyment of the benefits it confers which is inherent in it. "Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone." *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 334-335 (1944).

It is necessary also to be mindful of a significant change that the Hobbs Act made over the Federal Anti-Racketeering Act of 1934 which it superseded. The Anti-Racketeering Act prohibited recourse to wrongful means to obtain "the payment of money or other valuable considerations" (§ 2(a)) or "the property of another" (§(b)).[13] The Hobbs Act eliminated "the payment of money or other valuable considerations" and retained only "the obtaining of property from another" as proscribed objects.[14]

The inchoate character of a collective bargaining agreement, and the more reified concept of "property" which alone was kept within the scope of the Hobbs Act, add to the certainty that to seek an improvement in the terms of a collective bargaining agreement cannot qualify as the felonious misappropriation of property. And obtaining improved terms

[13] *United States* v. *Local 807*, 315 U.S. 521, 525 (1942).

[14] H. Rep. No. 2176, 77th Cong., 2d Sess., 11 (1942).

is all that the indictment in this case charges as the alleged extortionate object of the defendants' conduct. The long and short of it, accordingly, is that it is simply not a willful misappropriation of another's property, and therefore not extortion, "to force" an employer "to agree to a contract . . . calling for higher wages and other monetary benefits" (JS 14a).[15]

C. The Aim of Congress To Reach the Conduct Disfavored in the Local 807 Case, and the Tailoring of the Hobbs Act to New York Law To Accomplish That End, Further Show That Securing an Improved Union Contract Is Not Within the Ban of the Hobbs Act Against Obtaining Another's Property.

We have shown (1) that a felonious intent to misappropriate the property of another is an essential element of the crime of extortion prohibited by the Hobbs Act, and (2) that efforts to secure a union con-

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[15] The Government has abandoned in this Court the claim it made in the court below that the "obtaining of property from another" by extortion comprehends "the company's 'right to negotiate' the wage questions without unlawful interference" (JS 3a). The claim is advisedly abandoned. The so-called " 'right to negotiate' . . . without unlawful interference" is conceptually "liberty," not "property." *Board of Regents* v. *Roth*, 40 U.S.L.W. 5079, 5081 (S. Ct. June 29, 1972). Furthermore, whether classified as liberty or property, state and federal law protect against interference with it by actual or threatened physical force (*infra*, pp. 56-59), and protection against other interference is governed exclusively by the National Labor Relations Act administered solely by the National Labor Relations Board. *E.g., N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960). Congress did not fashion the Hobbs Act as an instrument by which United States Attorneys would become roving overseers of industrial relations.

tract calling for higher wages and other increased monetary benefits simply do not constitute felonious attempts to misappropriate property. This conclusion is further confirmed by a particularized consideration of two interrelated themes which run through the legislative history of the Hobbs Act. First, Congress intended to bring within the scope of extortionate conduct the activity which this Court in *United States* v. *Local 807*, 315 U.S. 521 (1942), held had been excepted from the reach of the Federal Anti-Racketeering Act of 1934 as "the payment of wages by a bona-fide employer to a bona-fide employee." Second, to accomplish this end, Congress adopted the definition of robbery and extortion embraced by the New York statute. We now show that neither the activity revealed in the *Local 807* case which Congress disfavored nor New York law remotely reaches a union contract for higher wages and other increased compensation.

1. The activity in the Local 807 decision which Congress disfavored does not embrace efforts to secure a collective bargaining agreement establishing higher remuneration for the performance of work.

The specific impetus behind enactment of the Hobbs Act was Congress' displeasure with the activity revealed in the *Local 807* decision which this court held was excepted from the reach of the Federal Anti-Racketeering Act of 1934.[16] This Court ruled in *Local*

[16] *United States* v. *Green*, 350 U.S. 415 (1956); H. Rep. No. 2176, 77th Cong., 2d Sess. (1942); H. Rep. No. 66, 78th Cong., 1st Sess. (1943); H. Rep. No. 238, 79th Cong., 1st Sess. (1945); 89 Cong. Rec. 3201, 3206, 3210-11, 3217, 3220 (1943); 91 Cong. Rec. 11842, 11844, 11847-48, 111900, 11903, 11907, 11910, 11911, 11912-13, 11920 (1945).

807 that the Anti-Racketeering Act did not forbid the exaction of money in the form of a wage demand, by use or threat of violence, from an employer for payment to a putative employee who performed no services for the money, when the putative employee made a good faith tender of work which he was willing to perform but which the employer rejected. This conduct was found to be within the statutory exception for "payment of wages by a bona-fide employer to a bona-fide employee." The point which divided the Court was expressed as follows by Chief Justice Stone in dissent (315 U.S. at 541):

> Even though the procuring of jobs by violence is not within the Act, and though this includes the "stand-by" job where no actual service is rendered, the granted immunity, unless its words be disregarded, does not extend to the case where the immediate objective is to force the payment of money regardless of the victim's willingness to accept and treat the extortioner as an employee. It was for the jury to say whether such was the objective of respondents and whether they were aware that the money was paid because of their violence and not as wages.

Accordingly, in relationship to the specific holding in *Local 807,* the short and simple objective of Congress in the Hobbs Act was to prohibit the violent coercion of payment for a stand-by job, which the employer rejected, and where no actual services were to be rendered. The rhetoric employed by various Congressmen to express this objective was understandably imprecise, but the unifying theme of their concern was the exertion of actual or threatened violence to compel an employer to pay for nothing or very nearly nothing.

Representative Hobbs stated that "what we are talking about here is where the employment is by duress or coercion. And that is all the bill provides for."[17] Representative Hancock stated that "[t]his bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion *under the guise of obtaining wages* in obstruction of interstate commerce"; it reaches "attempting by the use of force or the threat of violence to obtain wages for a job *whether they rendered any service or not*"; and he read approvingly from an editorial condemning "compelling the truckers to pay day's wages to local union drivers *whose services were neither wanted nor needed.*" 91 Cong. Rec. 11900 (1945) (emphasis supplied). Representative Anderson identified the mischief as paying "the man who . . . *does no work* as far as driving or unloading the truck is concerned." 91 Cong. Rec. 11904 (1945) (emphasis supplied). Representative Fellows inveighed against "these stick-up men [who] disappeared as soon as the money was paid *without rendering or offering to render any service.*" 91 Cong. Rec. 11907 (1945) (emphasis supplied). Representative Hobbs asked, "How can we hope to encourage honest men to work a full day for $9.42 if others get that as the fruit of a 10-minute robbery within the law?"[18]

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[17] Hearings, 224-225. Representative Fellows contrasted "an honest relationship of employer and employee, voluntarily entered into . . ." 91 Cong. Rec. 11907 (1945). Representative Jennings spoke of coerced payments "to men whom the owner of the truck and the produce had not only never employed but had never seen before." 91 Cong. Rec. 11911 (1945).

[18] 89 Cong. Rec. 3217 (1943).

It was thus the coerced payment for a rejected stand-by job, where no employment relationship existed and no services were rendered, which was the essential target of the Hobbs Act. It was to this mischief that Representative Hobbs directed his remarks when he stated that "I want to make it perfectly clear that the sole and simple purpose, the single purpose, of this bill is to do the best we can to protect interstate commerce and free the highways and streets of this country of robbers." 91 Cong. Rec. 11912 (1945).

The essential restriction of the reach of the Hobbs Act to the coercion of payment for rejected stand-by jobs is further confirmed by the contemporaneous refusal of Congress to enact legislation prohibiting the employment of more workers than needed. The 1942 hearings, in addition to considering the bill which ultimately became the Hobbs Act, also had under deliberation another bill, H.R. 6752, which proscribed as "not . . . within the legitimate objects" of a labor organization action "to induce or require any employer to employ, or to pay any wages, salary, or other compensation to any person when such person is in fact in excess of the number of persons reasonably required to perform the work in which the employer is engaged . . . ."[19] This provision drew the following criticism from Joseph A. Padway, the General Counsel of the American Federation of Labor:[20]

> A more broadly drawn or more impossible to administer provision is hardly imaginable. How a judge, jury, or prosecutor is to determine when in fact any person is in excess of the number of persons reasonably required, the proposed legis-

[19] Hearings, 4.

[20] *Id.* at 121.

> lation does not say. For instance, who is to say whether the driver of a truck shall be obliged to do his own unloading after he has continuously driven for 10 hours, or for 8 hours, or for 6 hours, or for 4 hours, and how may be determined the number of hours and the conditions of driving to permit the driver to enlist the services of a helper? At best, the administration of this provision would be a matter of guess, conjecture, or opinion. Such a provision would constitute a pervasive threat to all labor activities, and assuredly, such a provision does not meet the requirements of definiteness and certainty necessary to impose criminal penalties for violations thereof.

A spokesman for the Congress of Industrial Organizations similarly criticized the provision as placing within the judicial domain decision as to "the number of workers needed to avoid excessive speed-up", among the "very points in issue between employer and employee" which should be composed in collective bargaining.[21] Later in the hearings, when a proponent of the provision urged its adoption, Representative Hobbs expressed to the witness in the form of questions the identical criticism of the measure that Joseph Padway had previously levelled at it.[22] Representative Hobbs asked, for example, "when you say . . . no labor in excess of that reasonably necessary, is not that putting a pretty hard burden of construction and interpretation upon the agency which has to make that determination?"[23] Thereafter, in the ensuing 1943 and 1945 floor debates, there was not a word to suggest that the Hobbs Act was designed to control the employment

[21] *Id.* at 237.

[22] *Id.* at 346-347.

[23] *Id.* at 346.

of workers in excess of a reasonable number. This limitation on the Act's reach necessarily confines its operation to the performance of no work or sham work.

The cabined scope of the Hobbs Act was again verified when Congress explicitly addressed the question of "featherbedding" in enacting section 8(b)(6) of the National Labor Relations Act. The Hobbs Act became law on July 3, 1946. Within the year, on June 23, 1947, Congress passed section 8(b)(6) as part of its comprehensive amendment of the National Labor Relations Act. Section 8(b)(6) makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed . . . ." Congress thereby prohibited only "stand-by" practices (payment for no work at all); it remitted the regulation of "make work" practices (payment for work said to be useless) to the regime of collective bargaining. "Section 8(b)(6) leaves to collective bargaining the determination of what, if any, work, including bona fide 'made work', shall be included as compensable services and what rate of compensation shall be paid for it." *A.N.P.A.* v. *N.L.R.B.*, 345 U.S. 100, 110-111 (1953). "We are not dealing here with offers of mere 'token' or nominal services . . . . There is no reason to think that sham can be substituted for substance under § 8(b)(6) any more than under any other statute. Payments for 'standing-by,' or for the substantial equivalent of 'standing-by,' are not payment for services performed, but when an employer receives a bona fide offer of competent performance of relevant services, it remains for the employer, through free and fair negotiation, to determine whether such offer shall

be accepted and what compensation shall be paid for the work done." *N.L.R.B.* v. *Gamble Enterprises,* 345 U.S. 117, 123 (1953).

Accordingly, in enacting section 8(b)(6), Congress restricted its reach to exacted payment for no work or a sham substitution for no work. It is to the last degree unlikely that within less than a year before, Congress had already in an earlier criminal statute prohibited a broader range of activity than it was willing to embrace in later remedial civil legislation, particularly when a major reason for its restraint in section 8(b)(6) was that it " 'felt that it was impracticable to give a board or a court the power to say that so many men are all right, and so many men are too many,' "[24] the same area of concern that had been identified and deferred to in the 1942 hearings on the Hobbs Act (*supra,* pp. 30-32).

And so, beyond the specific area of no work or sham work, Congress left so-called "featherbedding" to the control of "private negotiation . . . ."[25] And reliance on the institution of collective bargaining to achieve a solution is itself a prime tenet of national labor policy. The genius of the institution is that it commits the composition of competing values to private decision and not to governmental determination either by the judiciary or other officialdom. National labor policy puts its faith in "the practice and procedure of free and private collective bargaining" (S. Rep. No. 105, 80th Cong., 1st Sess., 8 (1947), in 1 Leg. Hist. LMRA 414); "Government decisions should not be substituted for free agreement" (*id.* at 2, in *id.* at 408); the making

[24] *A.N.P.A.* v. *N.L.R.B.,* 345 U.S. 100, 108 (1945); see also, *Scofield* v. *N.L.R.B.,* 394 U.S. 423, 434 (1969).

[25] *Scofield* v. *N.L.R.B.,* 394 U.S. 423, 434 (1969).

of agreements is not to be trammelled by "governmental supervision of their terms" (S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935)). ". . . Congress intended that parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 488 (1960). A negotiator is free to push his view whether or not it is "rightly or wrongly" held. *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 294 (1959). And recourse to concerted activity to back a position is not dependent on the "wisdom or unwisdom of the men, their justification or lack of it" (*N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344 (1938)); "the reasonableness of workers' decisions" is not the criterion (*N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 16 (1962)). Private autonomy is thus the essence of the system.[26]

Accordingly, faithful to its reliance on private collective bargaining, Congress in the Hobbs Act, as in its virtually contemporaneous enactment of section 8(b)(6), refused to subject to governmental determination the actual utility of work, even where wrongful means were exerted to compose the disagreement, other than to bar exaction of payment for no work or sham work.

This Court in interpreting the Hobbs Act has carefully observed the line that Congress has drawn. In *United States* v. *Green*, 350 U.S. 415 (1956), the Court considered the meaning of the Hobbs Act in relationship to the disfavored activity disclosed in the *Local 807* case. The indictment in *Green* alleged the "wrong-

[26] See also, *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *N.L.R.B.* v. *Burns International Security Services*, 40 U.S.L.W. 4499, 4502-03 (S. Ct., May 15, 1972).

ful use . . . of actual and threatened force, violence and fear" to obtain from an employer "his money, in the form of wages to be paid for imposed, unwanted, superfluous and fictitious services of laborers commonly known as swampers . . ." (350 U.S. at 417). The Court decided, and all that it decided, is that "on the allegations of the indictment . . . the acts charged . . . fall within the terms of the [Hobbs] Act" (*id.* at 421). And indeed they do. For the alleged exaction of money for "imposed, unwanted, superfluous and fictitious services" falls within the class of no work or sham work ("superfluous and fictitious") whose tender the employer has rejected ("imposed" and "unwanted") but for which payment is nonetheless demanded by wrongful means ("actual and threatened force, violence and fear"). To resort to such wrongful means to exact payment for "imposed, unwanted, superfluous and fictitious services" is extortion within the ready and conventional meaning of the term. It is the felonious misappropriation of another's property because he is coerced to give up his money for which he receives nothing in exchange but "imposed, unwanted, superfluous and fictitious services."

But, as it relates to this case, what is striking about the decision in *Green,* and the indictment it upholds, is that it not only fails to support, but positively invalidates, the indictment in this case. The maximum reach of the Hobbs Act, no matter how generously it is interpreted, cannot go beyond exaction of payment for "imposed, unwanted, superfluous and ficitious services." Yet the indictment in this case alleges nothing of this nature. On the contrary, all that it alleges is wrongful means "to force" an employer "to agree to a contract . . . calling for higher wages and other monetary benefits" (JS 14a). A controversy over

"higher wages and other benefits" is within the inner core of collective bargaining.

According to the Government, however, it makes no difference that we deal here with "a *bona fide* labor dispute" and that the union's efforts are "directed simply at securing higher wages for existing employees holding down necessary jobs"; it rejects a distinction "between services that are wanted and those that are unwanted . . ." (Br. p. 6). The Government thus repudiates the entire basis on which the enactment of the Hobbs Act rests. The proponents of the Hobbs Act were preoccupied in whole with union activity which they disfavored because it was *not* part of "a *bona fide*" labor dispute"; because it was *not* directed "at securing higher wages for existing employees holding down necessary jobs"; and because the proferred services were indeed "unwanted." It turns the world upside-down to treat, as the Government does, a *bona fide* labor dispute as if it were a fraud; to treat "existing employees holding down necessary jobs" as if they were the same as nonemployees holding down no jobs; and to treat "wanted" services no differently from "unwanted" services.

Whatever criminal scope is given, in interpreting the Hobbs Act, to the exaction of "payment of money for imposed, unwanted and superfluous services", its reach surely does not embrace "the normal demand for wages as compensation for services desired by or valuable to the employer."[27] The two are at opposite

[27] *United States* v. *Kemble*, 198 F.2d 889, 892 (C.A. 3, 1952), cert. denied, 344 U.S. 893 (1952). In *Kemble*, in upholding a conviction under the Hobbs Act, the demand was to hire a man for a day at a wage of about $10, when there was only a few minutes' work left to do, and therefore the jury was free to find that the proferred services were a sham (*id.* at 900, Staley, J., dissenting).

poles. This Court in *Local 807* did not deal with "compensation for services desired by or valuable to the employer"; Congress in reacting to the situation in *Local 807* expressed no displeasure with the legitimacy of union action to secure increased compensation for desired or valuable services; and nothing in the concept of extortion, with whatever conventional or unconventional a sweep it may be read, embraces within its purview securing a union contract from an employer "calling for higher wages and other monetary benefits" for employees whose services the employer wants but who is unwilling to pay the employees what they believe their services are worth.

In short, in the words of the indictment in *Green*, the Hobbs Act reaches exacted payment "for imposed, unwanted, superfluous and fictitious services." At issue in this case, in the words of the indictment here, is a union contract "calling for higher wages and other monetary benefits." The Hobbs Act does not bridge, but designedly maintains the distance between, these two extremes.

2. New York law does not embrace as extortion efforts to secure a collective bargaining agreement establishing higher remuneration for the performance of work.

In defending against the claim that the Hobbs Act was "antilabor" in tenor, its proponents repeatedly asserted that they had done no more than to incorporate into it the conventional definitions of robbery and extortion expressed in the New York statute.[28] It is therefore appropriate to look to New York law for guidance in the interpretation of the Hobbs Act.[29] New

[28] 89 Cong. Rec. 3226 (1943); 91 Cong. Rec. 11842, 11843, 11900, 11910 (1945).

[29] *United States* v. *Nedley*, 255 F.2d 350, 355 (C.A. 3, 1958).

York law refutes any notion that labor action can be extortionate when its end is directed at obtaining a union contract "calling for higher wages and other monetary benefits."

Felonious intent to misappropriate another's property is an essential element of extortion under New York law.[30] "The intent to extort or gain must be wrongful and unlawful 'to obtain that which in justice and equity the party is not entitled to receive.' The ultimate object and intent of the party here accused was not *'lucri causa'* which must always characterize the act."[31] "The unlawfulness lies in the motive. If its purpose be unlawful, then the act (which under other conditions might be justified) becomes unlawful."[32] ". . . [T]he intent of the defendant to do an unlawful injury to the complainant's property was one of the essential elements of the crime."[33]

In New York, therefore, felonious intent to misappropriate property divides the licit from the illicit in determining whether labor action is extortionate. Accordingly, when the object of the activity is the personal enrichment of the actor, rather than the economic

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[30] Note, *Labor Faces The Amended Anti-Racketeering Act*, 101 Penn. L. Rev. 1030, 1037-39 (1953).

[31] *People* v. *Cuddihy*, 151 Misc. 318, 324, 271 N.Y.S. 450, 453 (Ct. Gen. Sess. 1934), aff'd., 243 App. Div. 694, 277 N.Y. Supp. 960 (1935).

[32] *People* v. *Sheridan*, 186 App. Div. 211, 213, 174 N.Y.S. 327, 329 (1919).

[33] *People* v. *Weinseimer*, 117 App. Div. 603, 616, 102 N.Y.S. 579, 588 (1907).

betterment of the worker, it is extortion.[34] On the other hand, where the end which the activity serves is attainment of a legitimate labor objective, there is no extortion because there is no intent to misappropriate property. Thus, "the collection or attempted collection of union dues", where there "is no claim that the dues were used for personal gain as distinguished from union activities . . . [,] cannot be blackmail or extortion. The felonious intent necessary to sustain a conviction for these crimes is wholly lacking."[35] Extortion does not exist where the proof is "insufficient to establish beyond a reasonable doubt" that the accused "was actuated by the purpose of obtaining a financial benefit for himself or his co-defendants and was not attempting in good faith to advance the cause of unionism . . . ."[36]

In short, under New York law, given the objective of securing a union contract "calling for higher wages and other monetary benefits," there can be no extortion because there can be no felonious intent to misappropriate property. In New York, at the time the Hobbs Act was passed, actual or threatened use of violence to obtain an improved union contract constituted the misdemeanor of coercion but not the felony

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[34] *People* v. *Barondess*, 133 N.Y. 649, 31 N.E. 240 (1892); *People* v. *Weinseimer*, 117 App. Div. 603, 102 N.Y.S: 579 (1907); *People* v. *Dioguardi*, 8 N.Y.2d 260, 168 N.E.2d 683 (1960), discussed in *United States* v. *Caldes*, 457 F.2d 74, 77-78 (C.A. 9, 1972).

[35] *People* v. *Gassman*, 182 Misc. 878, 885-886, 45 N.Y.S.2d 709, 715 (Ct. Gen. Sess. 1943), aff'd., 268 App. Div. 377, 51 N.Y.S.2d 173 (1944), aff'd., 295 N.Y. 254, 66 N.E.2d 705 (1946).

[36] *People* v. *Adelstein*, 9 App. Div. 2d 907, 908, 195 N.Y.S.2d 27, 28 (1959).

of extortion.[37] We know of no case in New York, or in any other jurisdiction, where the exertion of wrongful means to secure better employment terms has been suggested, much less held, to be extortionate. And the short and simple reason is that the objective sought is incapable of translation into a felonious intent to misappropriate property.

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[37] See, *People* v. *Kaplan*, 240 App. Div. 72, 269 N.Y.S. 161 (1934), aff'd., 264 N.Y. 675, 191 N.E. 621 (1934). See also, Hearings, 213-214. Section 530 of the New York Penal Law of 1909, in effect when the Hobbs Act was passed, provided that:

> A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,
>
> 1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,
> 2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,
> 3. Uses or attempts the intimidation of such person by threats or force,
>
> Is guilty of a misdemeanor.

A misdemeanor was then punishable by one year imprisonment, a $500 fine, or both (§ 1937). In 1965, effective September 1, 1967, the New York Penal Law of 1909 was repealed and replaced by the New York Penal Law of 1965 (§ § 500.05, 500.10). As part of this change, the old § 530 was incorporated in an expanded version of the crime of coercion consolidating a number of different provisions, it now appearing as § 135.60, coercion in the second degree, a class A misdemeanor punishable at not more than one year imprisonment (§ 70.15), and as § 135.65, coercion in the first degree, a class D felony punishable at not more than seven years imprisonment (§ 70.00(2)(d)).

D. Section 602 of the Labor-Management Reporting and Disclosure Act Shows That It Is not Extortion To Seek "A Bona Fide Increase in Wages or Other Employee Benefits."

The conclusion that the Hobbs Act does not sweep within its scope action taken, however illicit the means, when the end to which the efforts are directed is obtaining a valid collective bargaining agreement is confirmed by viewing it in the "cross light" [38] which is thrown by Congress' enactment in 1959 of section 602 of the Labor-Management Reporting and Disclosure Act.[39] Section 602, revealingly entitled "extortionate picketing," provides that

> (a) It shall be unlawful to carry on picketing on or about the premises of any employer for the purpose of, or as part of any conspiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual (except a bona fide increase in wages or other employee benefits) by taking or obtaining any money or other thing of value from such employer against his will or with his consent.
>
> (b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

It is plain on the face of section 602 that it excludes from its purview "a bona fide increase in wages or other employee benefits." Whether the picketing is extortionate thus turns on the end to which it is directed. There is simply no extortion when the end sought is "a bona fide increase in wages or other employee benefits." Congress in section 602, in prohibit-

[38] *Pipefitters Local Union 562* v. *United States*, 40 U.S.L.W. 4786, 4795 (S. Ct., June 22, 1972).

[39] 73 Stat. 539, 29 U.S.C. § 522.

ing extortionate picketing, has expressed explicitly the meaning which inheres in the Hobbs Act as well.

The legislative history of section 602 is especially instructive because it shows that Congress has deliberately linked section 602 with the Hobbs Act. Section 602, when first referred to the Senate Labor Committee in 1959, began as an amendment to section 8(b) of the National Labor Relations Act and made it an unfair labor practice for a labor organization or its agents:[40]

> to carry on picketing on or about the premises of any employer for the purpose of, or as part of any conspiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual by taking or obtaining any money or other thing of value from such employer against his will or with his consent.

As reported by the Senate Labor Committee, two alterations were made in this provision. The parenthetical qualification excluding "a bona fide increase in wages or other employee benefits" was added, and the offense was changed from an unfair labor practice to a misdemeanor punishable by a fine of not more than $10,000 or imprisonment for not more than one year or both.[41] The substantive offense now read as follows:

> It shall be unlawful to carry on picketing on or about the premises of any employer for the pur-

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[40] S. 505, 86th Cong., 1st Sess., § 602(a), January 20, 1959, in 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 76 (1959), hereafter cited as "Leg. Hist. LMRDA."

[41] S. 1555, 86th Cong., 1st Sess., § 111, March 25, 1959; S. Rep. No. 187, 86th Cong., 1st Sess., 67-68 (1959); in 1 Leg. Hist. LMRDA 362-363, 463-464.

> pose of, or as part of any conspiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual (except a bona fide increase in wages or other employee benefits) by taking or obtaining any money or other thing of value from such employer against his will or with his consent.

The Senate Report described the evil against which the prohibition was aimed:[42]

> It would . . . make it a criminal offense for a labor organization to conduct "shakedown" picketing, i.e., picketing with no legitimate purpose but which is to force an employer to "buy off" the union official involved. The subsection bans picketing to exact from the employer a payment for the enrichment of an individual as distinguished from bona fide picketing, the purpose of which is improvement in wages and working conditions of employees.

Senators Goldwater and Dirksen, who claimed authorship of the changes in committee, explained that they had corrected "faulty draftsmanship" which "would have prevented a union from picketing for a pay increase or any other legitimate economic benefit."[43]

Thus, "shakedown" picketing or "extortion" picketing was the mischief at which the prohibition was aimed, as distinct from picketing for an "improvement in wages and working conditions of employees." And the explicit exclusion of "a bona fide increase in wages or other employee benefits" was a perfecting correction of "faulty draftsmanship" designed to assure the pro-

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[42] S. Rep. No. 187, 86th Cong., 1st Sess., 43 (1959), in 1 Leg. Hist. LMRDA 439.

[43] *Id.* at 92, in *id.* at 488.

tection of "picketing for a pay increase or any other legitimate economic benefit."

Section 602 took its final shape on the Senate floor. Senator McClellan expressed the concern of the Justice Department that section 602 prescribed a lesser punishment than imposed by the Hobbs Act:[44]

> The Justice Department is greatly concerned about what we are proposing to do to the Hobbs Act, which provides a penalty for extortion up to as high as 20 years imprisonment, whereas the bill under consideration would reduce the penalty, as I recall, to 1 year. That is a serious matter.

To allay this concern, Senators John F. Kennedy and McClellan joined in proposing an amendment which retained the substantive offense intact, but which altered the punishment to provide that "Any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $10,000 or to imprisonment for not more than twenty years, or both."[45] The sanctions for violation of section 602 and the Hobbs Act were thus exactly aligned. Senator Kennedy explained that:[46]

> Under the provisions of the Kennedy-Ervin bill last year we provided that anyone who engaged in picketing for the purpose of a shakedown should be guilty of an unfair labor practice. That was an additional remedy, to be available in addition to the Hobbs Act.
>
> There has always been some question as to whether the Hobbs Act applied to cases in which

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[44] 105 Cong. Rec. 6288-89 (1959), in 2 Leg. Hist. LMRDA 1050.

[45] 105 Cong. Rec. 6530 (1959), in 2 Leg. Hist. LMRDA 1135.

[46] *Ibid.*

violence did not take place. In addition, this provision provided a quicker remedy. It provided for compulsory immediate injunction, while the criminal prosecution might be going on.

There was some objection to making this practice an unfair labor practice, and a felony rather than a misdemeanor. The Department of Justice raised the question 3 or 4 days ago as to whether this provision might not raise some question as to the sanctions available under the Hobbs Act. Therefore, in order to make sure that there is no choice of sanctions, as between those which might be misdemeanors and those which might be felonies, the amendment is now rewritten, so that the sanctions against using a picket line for the purposes of extorting money are now identical with those under the Hobbs Act.

This provision would not weaken or change the Hobbs Act. It would merely provide that when there is any question as to whether the Hobbs Act applies in cases in which violence does not occur—as in the case of shakedown picketing—adequate sanctions are provided. This language is in accordance with the views of the Department of Justice.

Thus, in enacting section 602, Congress' purpose was to ensure that, if the conduct were not already reached and punishable by the Hobbs Act,[47] nonviolent picketing

[47] The Hobbs Act unquestionably reaches actual or threatened "labor trouble" designed for the purpose of securing the personal enrichment of the actor or another; such conduct is within the traditional target of an anti-racketeering prosecution under the Hobbs Act. *E.g., United States* v. *Kramer*, 355 F.2d 891 (C.A. 7, 1966), certiorari granted and cause remanded for resentencing but otherwise certiorari denied, 384 U.S. 100 (1966); *United States* v. *Provenzano*, 334 F.2d 678 (C.A. 3, 1964); *United States* v. *Palmiotti*, 254 F.2d 491 (C.A. 2, 1958).

would be reached by section 602 and identically punishable when its purpose was "the personal profit or enrichment of any individual"—the "shakedown," the "buy off," the "payoff."[48] As explained by Senator Goldwater in a question-and-answer analysis:[49]

> Question. Now let's get to picketing. Just what kind of picketing is involved and what will the new law do about it?
>
> Answer. Well, first of all there is what they call extortionate picketing. This is made a crime punishable by $10,000 and imprisonment for not more than 20 years.
>
> Here is what is meant by extortionate picketing: Extortionate picketing is completely phony, phony in this sense: That the purpose of the picket line has absolutely no connection with any labor-union objective, such as wages, working conditions, organizing the employees—nothing like that.
>
> Its simple purpose is exactly the same as that of a man pointing a gun at you and saying, "If you don't give me your money I'll shoot you. Give me the money and I'll remove the gun." That's what the purpose of this picket line is. It's to go to the employer and say, "For $5,000 you can have the picket line removed." That's just one.
>
> Question. They are not demanding that he unionize?
>
> Answer. That's right. They are not interested in that. The purpose of this picket line has nothing to do with any union affair. They are merely using a union device to extort money.

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[48] 105 Cong. Rec. 885 (1959), in 2 Leg. Hist. LMRDA 969 (Senator Kennedy).

[49] 105 Daily Cong. Rec. A8357 (1959), in 2 Leg. Hist. LMRDA 1828.

For those Senators who believed that nonviolent "shakedown" picketing was already a crime under the Hobbs Act, section 602 avowedly added nothing. "This [section 602] makes it a crime to picket for the purpose of compelling the picketed employer to pay off an 'individual' in order to get rid of the picket line. Again, this is naked extortion and is already a crime both under State and Federal law (the Hobbs Act)." [50] But whether section 602 is supplemental or redundant, it explicitly and designedly does not reach as extortionate "a bona fide increase in wages or other employee benefits." When Congress addresses extortion, it does not speak of wage increases or other improvements in employee benefits. The indictment in this case, in alleging as extortionate the obtaining of a union contract "calling for higher wages and other monetary benefits," is thus wholly alien to the premises on which Congress has acted.

E. The Government's Argument Is in Conflict With the Conventional Concept of Extortion and With the Purpose, History, and Administration of the Hobbs Act.

The Government's argument does not address ours. We turn to what it does say.

1. The central fallacy in the Government's position is epitomized in its statement that "higher wages obtained for wanted services through threats or acts of violence stand on no different footing under the Hobbs Act than wages for unwanted services similarly obtained" (Br. p. 10). The Government thus cuts off extortion from its roots in the felonious misappropria-

[50] S. Rep. No. 187, 86th Cong., 1st Sess., 99 (1959), in 1 Leg. Hist. LMRDA 495 (Senators Goldwater and Dirksen). See also, 105 Cong. Rec. 6430, 7631, 10099, in 2 Leg. Hist. LMRDA 1081, 1271, 1285 (Senator Goldwater).

tion of property and treats the offense as if it were founded in violence simpliciter. For to obtain higher wages for wanted services is simply not misappropriation of property. The worker only gets what he believes his work is worth even though that may be more than the employer would like to pay for it. Violence is not a lawful means to fix the level of compensation but violence standing alone is not extortion. And it stands alone when it is divorced from felonious misappropriation of property. Violence simpliciter does not make out extortion any more than violence simpliciter makes out an antitrust violation not otherwise established[51] or a secondary boycott whose elements are otherwise lacking.[52] Violence as such is punishable but not as extortion.

The Government's dissociation of extortion from felonious misappropriation of property is a new thought for it. When it argued the *Local 807* case, it understood the difference between violence simpliciter and extortion, and it expressed the distinction as follows in its brief to this Court in that case (p. 46):

> If the defendants had been seeking to achieve a legitimate labor objective, we doubt whether their activities would come within the scope of the Act simply because of the presence of violence. The whole tenor of the Act indicates that Congress intended to punish activities similar to extortion; violence used as a means of obtaining a lawful labor union objective is not extortion but simply a breach of the peace or other kindred unlawful act.

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[51] *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940).

[52] *International Rice Milling Co.* v. *N.L.R.B.*, 341 U.S. 665, 672 (1951); *United Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, 501-502 (1964).

Until the indictments were returned in 1970 in this case and contemporaneously in three others (*supra*, pp. 7-8), except for one instance in 1962 which resulted in an acquittal,[58] the Government did not in the twelve years of the Federal Anti-Racketeering Act of 1934 or the 24 years of the Hobbs Act of 1946 ever prosecute as extortion violence employed to secure a union contract "calling for higher wages and other monetary benefits." Yet throughout this time there were countless strikes for improved employment terms in which violence occurred; in many the strikes were prominent and the violence serious. They were often the subject of litigation before the courts or the National Labor Relations Board. They were matters of obvious public notice. They would hardly have escaped the attention of the United States Attorneys in the areas in which the strikes took place or of the Justice Department. Yet no Hobbs Act prosecutions were instituted. It is to the last degree unlikely that the seminal significance now attributed to the Hobbs Act could have for so long been so undiscerned.

What the Justice Department failed to discern similarly evaded the notice of Congress. In 1947, within less than a year of the enactment of the Hobbs Act in 1946, Congress passed section 8(b)(1)(A) of the National Labor Relations Act, making it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in section 7"; this prohibition, a supplement to the exercise of state power to control violence, reaches "union tactics involving violence, intimidation, and reprisal or threats thereof . . ." (*infra*, p. 58). Thus, "the use of violence during a strike . . . was the subject of con-

[58] *United States* v. *George Samuel Webb*, N.D.Ala. No. 15080.

gressional attention the year following enactment of the Hobbs Act. The Taft-Hartley Act contained specific provisions which condemned this action as unfair labor practices . . . . It is significant that during congressional deliberation on the bill no congressman expressed an opinion that the Hobbs Act of the preceding year covered union violence while a strike was in progress." *United States* v. *Caldes,* 457 F.2d 74, 78 (C.A. 9, 1972).

Contemporaneous understanding and administration is a better guide to meaning than latter-day imagination and zeal.

2. The Government relies upon the legislative history of the Hobbs Act to support its expansive reading of extortion (br. pp. 13-19). But that history, as we have shown, confines Congress' objective at maximum to exacted payment for "imposed, unwanted, superfluous and fictitious services" (*supra,* pp. 27-31, 34-37). The Government's distortion of the history is illustrated by its major reliance on the statement of Representative Michener that workers are not exempt from the Hobbs Act when "by robbery or exploitation" they "collect a day's wage—a union wage" (Br. p. 15). Representative Michener thus protests the collection of " a day's wage" by "robbery or exploitation," and the reference to "robbery or exploitation" returns us to extortion—the felonious misappropriation of property—as the offense, not to violence simpliciter. The point is put beyond doubt by the Government's elision from Representative Michener's statement. His statement continues as follows: "Mr. Speaker, I cannot understand how any union man can claim that the conduct described by Mr. Justice Stone is a legitimate union activity" (91 Cong. Rec. 11844 (1945)). Justice

Stone's point in *Local 807* was limited to violent coercion of payment for a stand-by job, which the employer rejected, and where no actual services were to be rendered (*supra*, p. 28). It has nothing to do with compensation for work which the employer wants performed but for which he is unwilling to pay what the worker thinks it is worth.

The Government relies on the rejection of an amendment to the bill proposed by Representative Celler which would except from coverage "wages paid by a bona fide employer to a bona fide employee" (91 Cong. Rec. 11913, 11919 (1945)), and on the rejection of an amendment proposed by Representative LaFollette which would except from coverage "the payment of wages paid by a bona fide employer to a bona fide employee" unless use or threat of "force or violence against the body or to the physical property (as distinguished from intangible property)" is employed to compel payment (91 Cong. Rec. 11919, 11922 (1945)) (Br. pp. 17-18). Both amendments were rejected, however, solely because of fear that each would operate to continue the legality of the disfavored conduct revealed in the *Local 807* decision. Thus, Representative Hobbs objected to the Celler amendment because it "would invite . . . the same error" as in the *Local 807* decision; agreeing with Representative Jennings, he protested that, unless the Court were to repudiate the basis of its decision in *Local 807*, reiteration of the same words "already . . . passed on" would result in "exactly" the same decision (91 Cong. Rec. 11914 (1945)). As Congressman Walters put it *(ibid.)*:

> . . . [T]o adopt the amendments offered . . . would result in an action that would be tantamount to doing nothing, because the language of the amend-

> ment is designed to retain the law in its present status. There is no question about that.

The same objection was voiced to the LaFollette amendment as expressed by Representative Gwynne (*id.* at 11920-21):

> . . . [Should the amendment be adopted] we would then have marched up the hill and marched down again, because the law would be exactly the same as it is now.
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> * * *
>
> The amendment offered . . . would leave those words right in the law and it would be an open invitation to the Supreme Court to decide that [*Local 807*] case the same, if it should come before them again; in fact, if they believe in stare decisis over there—about which I sometimes wonder—they would be obligated to affirm their decision because the Congress had in effect affirmed the statute which the Court had construed in a certain way. In addition to that there are some other provisos in here which purport to make a sort of change in our notion of robbery. Intangible property is spoken of . . . .
>
> The amendment offered . . . does not mean a thing. If you are opposed to the bill, defeat the bill if you want to, but let us not kid ourselves by putting in this amendment because if we do we will have accomplished nothing to right the wrongs about which we have been complaining.

Accordingly, the Celler and LaFollette amendments were rejected because of fear that their adoption would leave the *Local 807* decision intact. Their rejection provides no support for innovation of a new concept of extortion divorced from the felonious misappropriation of property and resting on violence alone. We need hardly add that, contrary to the Government's

suggestion (Br. pp. 16-17), we look to the views of the proponents, not to the apprehension of the opponents, for a reliable guide to statutory interpretation.[54]

3. The Government relies on three cases said to support its expansive notion of extortion (Br. pp. 12-13). None do.

In *Battaglia* v. *United States,* 383 F.2d 303 (C.A. 9, 1967), cert. denied, 390 U.S. 907(1968), the wrongful means employed were an implied threat of murder and an actual threat of physical damage to property, and the felonious misappropriation of property which made those threats extortion was the expropriation of space from the victim in his bowling alley for a coin-operated pool table and a share of the profits from its operation. In *United States* v. *Tropiano,* 418 F.2d 1069 (C.A. 2, 1969), cert. denied, 397 U.S. 1021 (1970), the wrongful means employed were threats of personal physical violence, and the felonious misappropriation of property which made those threats extortion was to force the victim to cease engaging in a competitive business (*id.* at 1072, 1075). In *United States* v. *Glasser,* 443 F.2d 994 (C.A. 2, 1971), cert. denied, 404 U.S. 854 (1971), the wrongful means employed were to spray acid on windows installed by nonunion glaziers, and the felonious misappropriation of property which made that activity extortion was to force the victims into an unwanted business relationship by requiring them to engage glaziers they would not otherwise have employed, reminiscent of "the employment . . . by duress and coercion" where no genuine relationship existed or was in prospect against which Representative Hobbs spoke (*supra,* p. 28).

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[54] *N.L.R.B.* v. *Fruit and Vegetable Packers,* 377 U.S. 58, 66 (1964).

In all three cases, accordingly, wrongful means *plus* felonious misappropriation of property were conjoined to establish extortion. None analytically support a view that resort to wrongful means alone suffices to prove extortion. And none begins to suggest that the end sought here—identified by the Government as "higher wages for wanted services as in the present case" (Br. p. 16)—remotely resembles felonious misappropriation of property.

4. When the Government would convert an extortion statute into a medium by which to reach violence simpliciter in labor disputes, it wrenches industrial violence from its societal context, disregards the traditional means by which that wrong has been regulated, works a gross distortion of state-federal relations in this area, and disserves other important interests. This subject merits separate consideration and we undertake it in Part II of this brief which follows.

II. INDUSTRIAL VIOLENCE CANNOT BE REACHED BY A FEDERAL EXTORTION STATUTE WITHOUT WRENCHING IT FROM ITS SOCIETAL SETTING AND DISLOCATING THE EXISTING MEANS BY WHICH IT IS CONTROLLED.

A. The Societal Setting of Industrial Violence.

Strike violence, while happily diminishing, is an indelible part of the industrial scene in the United States.[55] "The United States has had the bloodiest and most violent labor history of any industrial nation in the world. Labor violence was not confined to certain

[55] P. Taft and P. Ross, American Labor Violence: Its Causes, Character And Outcome, 221-301, in H. Graham and T. Gurr, Violence In America: Historical And Comparitive Perspectives, A Report to the National Commission On The Causes And Prevention Of Violence (June 1969).

industries, geographic areas, or specific groups in the labor force, although it has been more frequent in some industries than in others. There have been few sections and scarcely any industries in which violence has not erupted at some time, and even more serious confrontations have on occasion followed."[56]

"At different times employers and workers have played the roles of aggressors and victims";[57] "Employers and unions were both guilty of violence."[58] Union violence is often a reaction to employer provocation and obduracy.[59] "In some cases employers have directed detective agencies to perform acts of violence, or have instigated such acts, or have made their commission inevitable. This has been done either to discredit strikers because of such acts, to break their morale by the use of physical force, or to create a disorderly situation of such proportions that the armed intervention of the State will be required to suppress it."[60] "With a few exceptions, labor violence was the result of isolated and usually unplanned acts on a picket line, or occurred during a prohibited parade or demonstration protesting employer obduracy or police brutality."[61] "It is the violent encounters that have provided organized labor with its list of martyrs, men and women who gave their lives in defense of the union and collective bargaining."[62]

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[56] *Id.* at 221.

[57] *Ibid.*

[58] *Id.* at 289.

[59] *Id.* at 289-290.

[60] S. Rep. No. 6, Part 1, 76th Cong., 1st Sess., Violations of Free Speech and Rights of Labor, 137 (1939), and *passim* 97-114, 135-137.

[61] P. Taft and P. Ross, *supra*, at 291.

[62] *Id.* at 290.

The unhappy story of industrial violence is chronicled in the decisions of this Court. The "history of the bituminous coal industry is written in blood as well as ink." *Sunshine Anthracite Co.* v. *Adkins,* 310 U.S. 381, 395 (1940). Railroad strikes have been marked by violent clashes resulting in personal attacks, property damage, and interruption of service. *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad,* 321 U.S. 50, 53 (1944). A city-wide dispute was marred by "window-smashing, bombings, burnings, the wreckage of trucks, shootings, and beatings...." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 292 (1941). A local strike escalated into forcible seizure of the plant, wreckage of machinery, and brutal violence. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 482 (1940). The passion and intensity of the conflict regrettably but predictably breeds strike violence.[63]

B. The Existing Legal Means of Controlling Industrial Violence

The labor movement has never countenanced strike violence as a means of achieving its ends.[64] And the law has never allowed it. The legal sanctions to control and punish strike violence are many and forceful.

1. The willful commission of strike violence is a crime in every state. State criminal law fastens onto

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[63] *N.L.R.B.* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240, 249 (1939); *Allen-Bradley Local No. 1111* v. *W.E.R.B.,* 315 U.S. 740 (1942); *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U.S. 656 (1954); *Youngdahl* v. *Rainfair,* 355 U.S. 131 (1957); *International Union, U.A.W.* v. *Russell,* 356 U.S. 634 (1957); *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).

[64] P. Taft and P. Ross, *supra,* at 222.

it severely. Thus a conspiracy to dynamite the boiler room of a cotton mill, the main office building of another cotton mill, and the substation of an electrical utility resulted in sentences of 6 to 10 years imprisonment. *State* v. *Walker,* 251 N.C. 465, 112 S.E. 2d 61 (1960), cert. denied, 364 U.S. 832 (1960).

2. Injunctions to stop strike violence are issued by state courts (*Youngdahl* v. *Rainfair,* 355 U.S. 131 (1957)), and state agencies (*Allen Bradley Local No. 1111* v. *W.E.R.B.,* 315 U.S. 740, (1942)). Disobedience results in civil and criminal contempt convictions with sanctions running the gamut of imprisonment, fines, and damages.

3. Strike violence is reached by civil actions to recover compensatory and punitive damages. *United Construction Workers* v. *Laburnum Construction Co.,* 347 U.S. 656 (1954); *International Union, U.A.W.* v. *Russell,* 356 U.S. 634 (1957). Judgments in the sum of $1,754,387.25 in compensatory and exemplary damages, reversed for reassessment of damages, were entered for the injury caused when, among other violence, "strikers marched by the hundreds, shoulder to shoulder, at the gates of the . . . plant, massed at the gates and blocked vehicles containing employees attempting to enter or leave, physically attacked employees attempting to enter or leave in automobiles or on foot, made contemptuous and threatening gestures to employees, shouted profanities, obscenities and threats of physical harm, shoved, pushed, slapped and scratched employees, and broke mirrors and radio antennas and windows of automobiles attempting to enter or leave the plant." *United Aircraft Corp.* v. *International Association of Machinists,* 161 Conn. 79,

92-93, 285 A.2d 330, 339 (1971), cert. denied, 404 U.S. 1016 (1972).

4. Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7", and this prohibition bars "physical violence and threat thereof" directed at employees for refraining from strike activity. *Sunset Line and Twine Co.*, 79 NLRB 1487, 1505 (1948). It supplements state power to control violence whether committed by employers or unions. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 668-669 (1954). It authorizes the National Labor Relations Board "to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof . . . ." *N.L.R.B.* v. *Drivers Local Union No. 639*, 362 U.S. 274, 290 (1960).

5. An employee's commission of strike violence subjects him to discharge or discipline by his employer for his misconduct. The National Labor Relations Board, in determining whether the employer's action is valid, looks to whether the strike misconduct is "of such a character as to render . . . [the] employees unsuitable for reemployment."[65] The totality of the strike situation is realistically appraised.[66] An em-

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[65] *Kansas Milling Co.*, 86 NLRB 925, 928 (1949), enforced in this respect, 185 F.2d 413, 420 (C.A. 10, 1950).

[66] *N.L.R.B.* v. *Illinois Tool Works*, 153 F.2d 811, 815-816 (C.A. 7, 1946); *N.L.R.B.* v. *Wallick and Schwalm*, 198 F.2d 477, 484-485 (C.A. 3, 1952); *N.L.R.B.* v. *Cambria Clay Products Co*, 215 F.2d 48, 54 (C.A. 6, 1954).

ployer's commission of unfair labor practices causing or prolonging a strike is itself a discrete factor which must be independently considered in extenuation of any employee misconduct which takes place during the strike.[67] The National Labor Relations Board, "as a part of the process of determining whether reinstatement would effectuate the policies of the Act, will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike." [68]

Finally, the informed evaluation of employee strike violence is infused with the insight that "some disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Section 13 of the Act, . . . that nothing therein should be construed so as to interfere with or impede or diminish

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[67] *N.L.R.B.* v. *Thayer Co.*, 213 F.2d 748, 753, 754, 755, 756-757 (C.A. 1, 1954), cert. denied, 348 U.S. 883 (1954).

[68] *Id.* at 755. See also, *Local 833, UAW* v. *N.L.R.B.*, 300 F.2d 699 (C.A.D.C., 1962), cert. denied, 370 U.S. 911 (1962); on remand in latter case, *Kohler Co.*, 148 NLRB 1434 (1964), enforced, 345 F.2d 748 (C.A.D.C. 1965), cert. denied, 383 U.S. 836 (1965); *Blades Mfg. Corp.*, 144 NLRB 561, 566-567 (1963).

in any way the right to strike. If this were not so, the rights afforded to employees by the Act would be indeed illusory." *Republic Steel Corp.* v. *N.L.R.B.*, 107 F.2d 472, 479 (C.A. 3, 1939), modified on another ground, 311 U.S. 7 (1940).

C. The Interests Disserved by Reading the Hobbs Act To Reach Strike Violence Standing Alone.

Given the distinctive societal setting of strike violence in this country, and the existing traditional means by which legal control is exercised over it, the conversion of an extortion statute into an instrument by which to reach strike violence simpliciter is alien both to the idea of extortion and to strike violence as a wrong. To join the two would be to dislocate important interests.

1. The legal control of strike violence, by both criminal and civil means, is essentially and primarily within the province of the States. State law bears the burden of regulation, the role of federal law being marginal and supplemental. A reading of the Hobbs Act to reach strike violence as such would mark a major federal encroachment upon a traditional state domain. That reading is subject to the same infirmity that this Court discerned in the Government's construction of the Travel Act in *Rewis* v. *United States*, 401 U.S. 808 (1971), and in its construction of Title VII of the Omnibus Crime Control and Safe Streets Act in *United States* v. *Bass*, 404 U.S. 336 (1971). As with each of these statutes, so with the Hobbs Act, "[b]ecause its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the

States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *United States* v. *Bass,* 404 U.S. 336, 339 (1971). The rationale of this conclusion applies with full force in this case (*id.* at 349-350):

> . . . [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been reluctant to define as a crime conduct readily denounced as criminal by the States . . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision . . . . In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. . . . [It] dramatically intrudes upon traditional state criminal jurisdiction. . . . [T]he legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government.

". . . [T]he States under our federal system have the principal responsibility for defining and prosecuting crimes." *Abbate* v. *United States,* 359 U.S. 187, 195 (1959). The strong disinclination against sweeping within the federal criminal law conduct which is traditionally within the mainstream of state criminal law is greatly reinforced in the area of strike violence

by the explicit and affirmative direction of Congress expressed in the Norris-LaGuardia Act.[69] That Act's prohibition against the issuance of an injunction by a federal court in a labor dispute does not extend to conduct involving "fraud or violence" (§4(e), (i)). But before an injunction barring violence may issue the federal court is required to find *inter alia* that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection" (§ 7(e)). A breakdown in state protection is therefore the indispensable precondition to federal intervention even in the civil area.[70] Congress could hardly have intended to reach strike violence by its criminal process when it refuses to brook civil entry where adequate state protection is available. *Cf., United States* v. *Hutcheson,* 312 U.S. 219, 234-235 (1941).

2. The Government's expansive reading of the Hobbs Act would bear with especial severity on the individual who is accused of strike violence. All strike violence would be swept within the scope of the Hobbs Act, from the fist fight to murder, from a deflated tire to arson, and all would be subject to the same Draconian punishment of twenty years imprisonment and a $10,000 fine. In contrast, as Louisiana law illustrates (*supra,* pp. 5-7), state law is much more circumspect, making careful distinctions in the gravity of the particular wrong and the harm it causes, and moderat-

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[69] 29 U.S.C. § 101 (1964).

[70] *E.g., Cimarron Coal Corp.* v. *District No. 23, U.M.W.,* 416 F.2d 844 (C.A. 6, 1969), cert. denied, 397 U.S. 919 (1970); *Donnelly Garment Co.* v. *Dubinsky,* 154 F.2d 38 (C.A. 8, 1946).

ing the punishment to fit the crime.[71] It is highly unlikely that, had Congress indeed faced the question of strike violence and decided to control it as a federal crime, it would not have graded both the particular offense and the corresponding punishment as state law ordinarily does.[72]

But the severity on the individual does not stop with the impact of the Hobbs Act standing alone. For, under the law as it now is, successive state and federal prosecutions for the same offense are not barred, the alleged misconduct being considered a separate crime under state and federal law separately punishable by each sovereign.[73] Under this regime, an accused convicted of strike violence constituting aggravated arson could be sentenced to twenty years imprisonment by Louisiana and another twenty years imprisonment by

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[71] See, Model Penal Code, Proposed Official Draft, American Law Institute, July 30, 1962, which, as to arson, criminal mischief, and other property destruction, variously grades the offense as felony of the second degree, felony of the third degree, or misdemeanor based on the circumstances of its commission (Art. 220). For variation in the punishment based on the difference in grading, see *id.*, Art. 6.

[72] See, Final Report of the National Commission on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code (1971), which, as to arson and other damage to property within federal jurisdiction, variously grades the offense as a Class B or C felony or a Class A or B misdemeanor based on the circumstances of its commission (§§ 1701-05). In its comment on § 1705, criminal mischief, the Report states that, "This section is intended to provide a rational grading structure for the numerous property-damage and property-tampering provisions in existing law which are consolidated in it" (p. 197). For variation in punishment based on the grading of the offense, see §§ 3201-05, 3301-04.

[73] *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959).

the United States. Thus, under the Government's view, Congress doubled the punishment for the offense by adding federal to state sanctions. It is to the last degree unlikely that in enacting the Hobbs Act Congress confronted or intended any such result.

On the other hand, were the law to become that a federal prosecution bars a state prosecution for the same alleged offense,[74] the plight of the accused individual would be alleviated, but at the cost of the State's interest in doing its own work of preserving local order. The happenstance of a federal prosecution would oust the State in the vindication of an essential state concern, a major dislocation of the federal-state balance.

Each alternative flowing from acceptance of the Government's position is therefore seriously detrimental. Either the accused individual is exposed to double prosecution and vastly increased punishment, or the State's interest in preserving local order is subordinated. But the dilemma exists only because the Government would expand the Hobbs Act beyond its limited role. It disappears once the Hobbs Act is given its natural modest scope.

3. The extension of the Hobbs Act to reach strike violence "could overextend limited federal police resources . . . ." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Bass*, 404 U.S. 336, 349-

[74] *Cf.*, *Benton* v. *Maryland*, 395 U.S. 784 (1969); *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Concurring in *Ashe* v. *Swenson*, *supra*, Mr. Justice Black observed that: "On several occasions I have stated my view that the Double Jeopardy Clause bars a State or the Federal Government or the two together from subjecting a defendant to the hazards of trial and possible conviction more than once for the same alleged offense" (*id.* at 447).

350 (1971). There are simply not enough federal law officers to begin to police strike violence erupting everywhere and anywhere in the United States. Nor should the added burden upon an overworked federal court system be overlooked. The implication of these factors is not limited to the unlikelihood that Congress would dilute federal police resources or further tax the federal judiciary by expending their energy on matters that local authority can handle at least as well. The implication of inadequate federal police resources is far more fundamental and fateful as it relates to the preservation of the evenhanded administration of justice. For if federal police resources are not adequate to the task, the inevitable consequence will be that federal law will be applied haphazardly, erratically, or invidiously. It will vary from situation to situation and from community to community dependent on the accident of the preoccupation, zeal, interest, or worse of a particular United State Attorney. That environment breeds "arbitrary and erratic arrests and convictions." *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972). No interpretation of a statute is acceptable which unnecessarily commits "matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford,* 40 U.S.L.W. 4881, 4882 (S. Ct., June 26, 1972).

4. To moderate the sweep of its reading of the Hobbs Act, the Government would except from the strike violence it would reach "incidental injury to person or property that not infrequently occurs as a consequence of the charged atmosphere attending a prolonged labor dispute . . ." (Br. p. 19). But this retreat compounds the vice of its position. For the Government has now created an unknowable crime,

one that is void for vagueness. No one can say what strike violence is "incidental" and what is not, when the intention to commit it should be excused because energized by emotion, how "prolonged" a labor dispute must be before its duration justifies disregard of violence because it is the product of frustration, and at what level the degree of violence overbalances the provocation which causes it.

The Constitution prohibits guessing a man into the penitentiary by committing to the police, judges, and juries the assessment of such unbounded imponderables. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and juries to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 402-403 (1966). The Government's rendering suffers from the twin infirmities that the lines it purports to fix are too blurred to identify an ascertainable standard of conduct (*International Harvester Co.* v. *Kentucky,* 234 U.S. 216, 221-224 (1914); *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926)), and that it necessarily invites "arbitrary and erratic arrests and convictions." *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972); *Grayned* v. *City of Rockford,* 40 U.S.L.W. 4881, 4882 (S. Ct. June 26, 1972). The Government cannot salvage its overboard reading of the Hobbs Act by inventing a limited construction which is itself so imprecise that it "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against." *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89 (1921).

Moreover, the Government's position is internally inconsistent. Actual or threatened injury to person or property, however minor, intentionally inflicted for the purpose of feloniously misappropriating another's property would constitute extortion within the meaning of the Hobbs Act, as the Government would doubtless insist. For example, it surely would not say that minor violence employed by a faithless union official to extract money for his personal enrichment is not extortion. Yet in this case it draws a distinction between major and minor violence. The Government is driven to this distinction, not because the distinction is analytically supportable in defining extortion, but because it has divorced extortion from the felonious misappropriation of property. Given that sunderance, it is forced into a major-minor distinction, for otherwise all industrial violence would be swept into the extortion hopper, a result offensive to common sense and to the reality of the cause, incidence and conventional control of industrial violence. The need for a major-minor distinction disappears once the element of felonious misappropriation of property is restored as an indispensable constituent of extortion. For the familiar element of felonious misappropriation of property, not the alien import of a major-minor distinction in the means employed, then provides the balance to maintain a sensible application of the Hobbs Act crime of extortion.

5. We thus return to our starting point. The Hobbs Act crime of extortion is a "larceny-type" offense.[75] It is not stealing to seek a union contract "calling for higher wages and other monetary benefits." This is not the target at which Congress aimed. It cannot be

[75] *United States* v. *Sweeney*, 262 F.2d 272, 275 (C.A. 3, 1959).

called "levying tribute,"[76] "highway robbery,"[77] the work of "gangsters,"[78] "lawless bandits,"[79] "racketeers."[80] As is required in the interpretation of a criminal statute, giving the Hobbs Act a strict but sensible construction (*Arroyo* v. *United States,* 359 U.S. 419, 424 (1959)), in keeping with the rule in favor of lenity (*Rewis* v. *United States,* 401 U.S. 808, 812 (1971)), it cannot be read to reach strike violence when the violence is not conjoined with the felonious misappropriation of property. To seek an improved union contract is not to misappropriate another's property with felonious intent and therefore cannot be extortion. "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette* v. *United States,* 342 U.S. 246, 263 (1952).

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[76] H. Rep. No. 238, 79th Cong., 1st Sess., 10 (1945); 91 Cong. Rec. 11904, 11950 (1945).

[77] 91 Cong. Rec. 11901, 11904, 11907, 11910, 11911, 11917 (1945).

[78] 91 Cong. Rec. 11910 (1945).

[79] 91 Cong. Rec. 11912 (1945).

[80] 91 Cong. Rec. 11917 (1945).

CONCLUSION

For the reasons stated, the judgment should be affirmed.

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